it was bishop's teind before the statute of 1633 and the submission in 1627 and 1628. It is impossible to find any ground for holding that the date at which teind must be bishop's teind is antecedent to the Reformation.

The reason why this privilege is given to inalienable teind is obvious: If inalienable teind was liable to be localled on in the same way as ordinary free teind, all other teind being alienable, the heritors would buy up their teind, and acquire heritable rights to it, and so the whole burden of stipend would be thrown upon the inalienable teind, because it never can be bought up. The whole object of its being made inalienable would thus be defeated. That is the reason why this privilege was granted, in order that the teind might remain for the colleges, hospitals, and pious uses to which it was devoted. That is surely a sufficient reason for the privilege. As bishop's teinds are included in the same provision of the Stat. 1693, cap. 23, and declared entitled to the same privilege, it has been very properly uniformly extended to them too. I will not refer to the minor objections for the respondents, as they are of no importance to the law, and are not well founded.

The result of my opinion is in favour of the Lord Ordinary's interlocutor, with one exception—the Lord Ordinary has found "that the teinds of the parish of Withorn in the hands of the Crown are bishop's teinds, *or at all events church teinds.*" Now, if they are not bishop's teinds, they are not entitled to the privilege claimed. If they are church teinds, belonging to other churchmen than bishops, they have no privilege. That has been decided in two cases—*The Solicitor of Tithes* v. *The Earl of Moray*, 23d May 1797, No. 15,704, and *The Solicitor of Tithes* v. *Belsches*, 3d December 1800, M. App. *voce* Teind No. 10. The Lord Ordinary says in his *Note*, with regard to this—"Even if the teinds in question were to be held prior's teinds in the hands of the Crown, the Lord Ordinary would be disposed to give them the same privilege in allocation, though certainly this point is very open to dispute. The reason for the privilege is the same. The privilege of postponement has been extended to teinds for pious uses, and even to college teinds. See *Heritors of Portmoak* v. *Douglas*, 9th December 1795, M. 14,823. The analogy is very important, and shows that the privilege is not peculiar to the Crown." The analogy seems to me most misleading and false, because college teinds and teinds devoted to pious uses are declared equal with bishop's teinds and to have the same privileges, whereas other church teinds belonging to chapters or priors never had this privilege, and are not inalienable in the hands of the Crown. With that exception, I agree with the Lord Ordinary, and hold that the Crown has proved that these teinds are entitled to the privilege.

The other Judges concurred.

Counsel for Lord Advocate—Kinnear. Agent—W. H. Sands, W.S.

Counsel for Respondents—Marshall. Agents—Russe & Nicolson, W.S., and John Gibson, W.S.

COURT OF SESSION.

Wednesday, July 16.

FIRST DIVISION.

[Lord Mure, Ordinary

WALKER *v.* LANGDALES CHEMICAL MANURE COMPANY.

Sale—Delivery—Risk.

In a case where a party in Shetland sold quantity of whales' carcases, at a certain price per ton, to be delivered at the purchaser's wharf at Newcastle, and they became unfit for use on the voyage,—*held* that the risk was the seller's.

This was an action raised by John Walker against the Langdales Chemical Manure Company, for the purpose of recovering the price of 212 or thereby carcases of whales, sold by the pursuer, a farmer in Shetland, to the defenders, manure manufacturers in Newcastle, at the rate of 50s. per ton, payable on delivery at the defenders' wharf. The carcases did not arrive there till two-and-a-half months after the date of the contract, and were then condemned and destroyed by the Local Board of Health, as being putrid and injurious to health. The pursuer also sought to be relieved of a claim against him for £40 by the owner of the "Mars," the vessel in which the carcases were shipped, as the expense of destroying them, and of a further sum of £84 for demurrage. He pleaded—"(1) The defenders having purchased the carcases from the pursuer, and delivery having been tendered, the defenders are liable for the price thereof, and they are also bound to relieve the pursuer of the claim made by the owner of the 'Mars.' (2) The defenders, in the circumstances, are justly due and addebted to the pursuer in the price of the whales' carcases, and are bound to relieve the pursuer of the claim made against him for the expense of destroying the cargo, and for demurrage."

The defenders pleaded, *inter alia*—"(1) The pursuer having failed timeously to deliver or tender delivery to the defenders, in terms of the contract, of the goods contracted for, in such condition as by the contract they ought to have been, he cannot maintain the present action. (2) Having regard to the time when and the condition in which the goods arrived in Newcastle, the defenders were not bound to accept delivery thereof under the contract."

The Lord Ordinary pronounced the following interlocutor:—

"*9th April* 1873.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process—Finds, as matter of fact—1st, That in the end of December 1871 a contract was entered into between the pursuer and the defenders, by which the pursuer undertook to deliver at the defenders' wharf at Newcastle 212 or thereby carcases of whales, then lying at Uyea Sound, in Shetland, with heads, at the rate of 50s. per ton, to be paid on delivery; 2d, That upon the carcases arriving at Newcastle, which they did on the 7th of March 1872, they were in a putrid state, and unfit for being used in the manufacture of chemical manure; 3d, That when the condition of the cargo was made known to the Local Board of Health at Newcastle, proceedings were taken by them to prevent the

cargo from being landed, and it was thereafter condemned and destroyed, at their instance, as a nuisance and injurious to health; 4th, That when the whale heads arrived at Newcastle in the end of March they were also in a putrid condition,and unfit for the purpose of manufacture: Finds, in these circumstances, in point of law—(1st), That as the pursuer, by the contract founded on, undertook to deliver the carcases in question at Newcastle, the property, until delivered, was at the risk of the pursuer; (2d), That the defenders were entitled to refuse to take delivery of the carcases in the condition in which they were when tendered to them for delivery; and (3d), That the pursuer failed to deliver the goods contracted for to the defenders in terms of the contract: Therefore assoilzies the defenders from the whole conclusions of the action, and decerns: Finds them entitled to expenses, of which appoints an account to be given in; and remits the same, when lodged, to the auditor to tax and report.

"*Note.*—(1) It is very clearly established by the evidence in this case that the contract in question was (1) to deliver at Newcastle, and also that this obligation was deliberately undertaken by the pursuer. Because, in the earlier communications which passed between him and the defenders relative to the contract, the carcases were offered at 30s. per ton, 'free on board at Uyea;' but upon being informed by the defenders that they could not arrange for a vessel to take delivery in Shetland, and requested to offer the carcases for delivery at Newcastle, the pursuer did so at 50s., instead of 30s. per ton, thereby stipulating for 20s. per ton more, with a view, it is presumed, to meet the expense of transit and some of the consequent risks.

"(2) Such being the nature of the contract, it appears to the Lord Ordinary that the carcases, until delivery, were in law at the risk of the pursuer. It is so laid down by Erskine iii., 3. 7, and Prin. iii. 3, 3, in Bell's Coms., vol. i. p. 444; and it was so decided in the cases of *Spence*, 25th January 1807, Dict., p. 3153, and *Milne*, 1st Feb. 1809, F. C.

"(3) In these circumstances, it is not necessary, in the view the Lord Ordinary takes of the case, as between the pursuer and the defenders, to inquire whether the condition of the cargo when the vessel arrived at Newcastle was occasioned by improper delays and mismanagement of the cargo during the voyage. These are questions which must, it is thought, be disposed of between the pursuer and the owners of the vessel in which the carcases were shipped; because the pursuer by his contract was bound to deliver at Newcastle; and if the carcases, when there tendered for delivery, were in such a condition as entitled the defenders to reject them, it is, in the opinion of the Lord Ordinary, of no moment whether that was caused by unnecessary delays and mismanagement on the part of the master of the vessel during the voyage, or arose from delays occasioned by stress of weather or other unavoidable causes. In the case of *Milne*, above referred to, the condition of the wheat which led to and was held to warrant its rejection, appears to have arisen not from any fault on the part of the seller or those employed by him, but simply from the wheat having become heated in the course of the voyage, and being in that state when tendered for delivery.

"(4) As regards the condition of the carcases in question at the time of their arrival at Newcastle, it is, in the opinion of the Lord Ordinary, plain upon the evidence that they were then in an advanced state of decomposition—putrid, and unfit for disembarkation by any ordinary process. This is proved by the scientific witnesses examined, who saw the cargo, two of whom, viz., Dr Newton and Dr Hardcastle, inspected it on the 13th of March upon the employment of the defenders; and the other, Mr Pattinson, on the 14th, upon the employment of the pursuer, and whose evidence is fully more decided than that of the witnesses who inspected it for the defenders. The opinion of these witnesses is confirmed by that of the defenders' foreman, who inspected it on Monday the 11th; of the Inspector of Nuisances, who superintended its removal; and of the parties engaged under him in carrying out his directions. And this body of evidence from parties who saw the cargo is, in the opinion of the Lord Ordinary, more to be relied on upon a practical question of this description than the opinion of a scientific man even of the high position of Dr Stevenson Macadam, who had not an opportunity of examining the cargo.

"(5) This evidence, moreover, appears to the Lord Ordinary to be sufficient to show, not only that the carcases were not in a fit state to be landed, but also that they were not in a fit state to be manufactured into chemical manure, which was the purpose for which they had been bought. The defenders' foreman is very distinct upon this point; and, while there is no contrary evidence, his opinion in that respect is corroborated by that of the managing director of the defenders, and by two other chemical manure manufacturers at Newcastle, who say that carcases in such a putrid condition were not a merchantable commodity, could not be worked up without endangering the lives of the workmen, and would not therefore be received into any of their works. And that this opinion is acted upon is borne out by the fact that another cargo of whales purchased by the defenders, which arrived some time before the one in question, and which, when landed at a distance from Newcastle, was found to be in a decomposed state, was buried there, and has not yet been used; and that it is in evidence that the defenders do not intend to use it for several years to come, or until the flesh and obnoxious matter have been absorbed, and nothing is left but the bones.

"(6) It is strongly contended on the part of the pursuer that even if, in ordinary circumstances, the risk under a contract of this description lay with the seller till delivery, it had here been transferred, because of the defenders' refusal to allow the pursuer to use the necessary quantity of carbolic acid for the preservation of the flesh. But the Lord Ordinary is unable to read the communications which passed between the parties in this light. For he does not think that there was any refusal on the part of the defenders to allow carbolic acid to be used. They no doubt seem to have hesitated at first, as they do not appear to have been aware of the precise effect it might have upon the whales as an article of manure. But when informed by the pursuer that the chemists he consulted said it would do no harm, they seem at once to have consented to the pursuer using as much as he might see it prudent to do.

"Upon the whole matter, therefore, the Lord Ordinary has come to the conclusion that, as the

pursuer was under a contract to deliver at Newcastle, and the cargo when it arrived there was not only unfit for use, but even for being landed with safety, the pursuer has failed to deliver in terms of the contract, and that he is not therefore entitled to recover against the defenders, in terms of the conclusions of the summons."

The pursuers reclaimed.

Authorities—*Jaffé* v. *Ritchie*, 21 Dec. 1860, 23 D. 242; *Hansen* v. *Craig*, 4 Feb. 1859, 21 D. 432; *Hutchison* v, *Henry & Corrie*, 26 Nov. 1867, 6 Macph. 57; *Bull* v. *Robinson*, 10 Exch. 342; 24 L. J. Exch. 165.

At advising—

Lord President—The question raised in this case is of some importance, but to my mind I cannot say that it is attended with any difficulty. A contract of sale was entered into between the pursuer, who was resident in Shetland, and the defender, who was resident in Newcastle. It was concluded by means of various telegrams and letters, but it is needless to go into their terms, because the result of them is quite clear. The pursuer sold to the defender about 150 tons of whale flesh, meaning thereby flesh as distinguished from bones and blubber, and to this by a subsequent arrangement a certain quantity of bones was added. Now these materials were sold at a certain rate per ton, and it appears, in the first place, that the sale was *venditio generis* and not *venditio rei specificæ*, and, in the second place, it is clear that the price must have remained unascertained until delivery, because the quantity to be delivered was not ascertained. This is plain, for when the cargo was put on board the "Mars" we find the shipmaster and the seller differing about the quantity, one of them estimating it at 170, the other at 140 tons, and even that was not the entire amount to be sent, for another vessel was engaged to carry a further quantity. We see therefore that the quantity and price were both unascertained. But further, the seller undertook to give delivery at the defender's wharf at Newcastle, so that the time of delivery there was the first time that the price to be paid could be ascertained, and that was the first place at which delivery could be made. Whose, then, was the risk before the delivery at the defender's wharf at Newcastle, for the arrival of the vessel at Newcastle is not the point of time, even if delivery had been actually tendered, but her arrival at the defender's wharf. On both the grounds on which the case has been argued, I think the risk was the seller's, and the whale flesh having admittedly become unfit for use from the length of the voyage, he must be the one to suffer loss. The circumstance that the subject of sale was deliverable at Newcastle is of itself sufficient to settle the case against the pursuer, for both Erskine and Bell distinctly lay down that if a place be fixed for delivery the goods are held to be still the seller's till brought thither for delivery, the intermediate risk being his, and the two cases of *Spence* and *Milne* are direct authorities on the matter. But further, the uncertainty of the amount of the subject and of the price is a circumstance which settles the law against the pursuer, because while these are uncertain the risk is not transferred. The general rule is *res perit domino*, and the transference of the risk to the buyer is an exception to that rule, and only comes into existence when the subject and the price are both so fixed that the buyer can insist on the delivery of a specific article, and the seller on the payment of a fixed sum. The impossibility of enforcing a contract in such circumstances as the present is illustrated by the way in which the action is laid. The summons concludes for payment of £362, but how is that amount ascertained? Simply by assuming that the quantity on board the "Mars" was 145 tons, for there is no means of ascertaining. It was only by weighing the cargo at the place of delivery that the amount could have been ascertained; that has now become impossible, and so the summons is founded on mere conjecture. I am for adhering to the Lord Ordinary's interlocutor.

Lord Ardmillan—I have very little to add to what has been said. It is unfortunate that here we have two innocent parties complaining of a loss for which neither of them is to blame. The question is on whom the loss is to fall. The seller says the loss should fall on the purchaser; the purchaser says that it should fall on the seller. Now, I have come to the same conclusion as your Lordships, that the risk remains with the seller till delivery.

There was here a *venditio generis*, not the sale of a specific ascertained article. It was not possible that either the exact amount sold or the exact price could be ascertained until the vessel arrived. That is the first step in the case. The next step is that delivery to the pursuer was part of the contract, and capability of delivery was a quality of the article sold. Capability of delivery was thus a condition of the contract. The vessel was the seller's vessel *pro hac vice*, and when the vessel arrived delivery had become legally impossible.

There was a very important change made in the contract. Originally it was contemplated that the seller should give delivery in Shetland, and that the purchaser should procure a vessel and take the carcases to Newcastle. That was altered, and in consequence of the alteration a higher rate per ton was fixed as the price. It is obvious that the increase exceeded the mere cost of carriage, and the increase of price was added for the risk of delay. I do not think that the Mercantile Law Amendment Act applies. I think that it is important that we should adhere to the well-established rule of the law of Scotland, that when a contract is made for delivery of a specific quantity at a particular port, if the article perishes before it is delivered at the port it perishes to the seller.

Lords Deas and Jerviswoode concurred.

The Court pronounced the following interlocutor:—

> "Adhere to the said interlocutor and refuse the reclaiming note: Find the defenders entitled to additional expenses; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Pursuer—Millar, Q.C., and Keir. Agents—Andrew & Wilson, W.S.

Counsel for Defender—Solicitor-General (Clark), Q.C., Asher, and Taylor Innes. Agents—Boyd, Macdonald, & Lowson, S.S.C.

M., clerk.